



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 13 2002

OFFICE OF
CIVIL RIGHTS

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In Reply Refer to:
EPA OCR File No. 11R-01-R9

Al Brown
Director
Maricopa County Environmental Services Department
1001 North Central Avenue, Suite 595
Phoenix, Arizona 85004

Re: DISMISSAL OF TITLE VI ADMINISTRATIVE COMPLAINT

Dear Mr. Brown:

The purpose of this letter is to notify the Maricopa County Environmental Services Department (MCESD) that the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) is dismissing the administrative complaint dated August 17, 2001, filed with OCR pursuant to EPA's regulations implementing Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d *et seq.*, by the Citizens Environmental Awareness League (CEAL or Complainant) against MCESD. MCESD is a recipient of EPA funds. The complaint alleged that MCESD's scheduling of a public hearing concerning the renewal of an air permit for Sumitomo Sitix of Phoenix, Inc., (Sitix) on Tuesday, August 7, 2001, resulted in discriminatory effects on white Maricopa County residents.

I. SUMMARY OF FINAL DECISION

After an investigation, OCR finds no evidence to support the Complainant's allegation that MCESD's scheduling of the August 7, 2001, public hearing concerning the renewal of an air pollution permit for Sitix caused unlawful discriminatory effects under EPA's regulations implementing Title VI. OCR finds no violations of EPA's Title VI regulations and concludes that the facts do not substantiate the Complainant's allegations.

In conducting the investigation, OCR reviewed the complaint and MCESD's rebuttal, along with information independently gathered by OCR. OCR's investigation also included: phone interviews with the Complainant and MCESD; examination of written clarifications submitted by the Complainant; examination of written rebuttals submitted by MCESD; examination of data relating to attendance numbers and meeting times for each of the 17 air permit public hearings held by MCESD from January 1, 1998, to December 31, 2001; and examination of advance public notices of the August 7, 2001, hearing issued by MCESD and the facility.

Overall, OCR concludes that MCESD provided a reasonable opportunity for public participation in its consideration of the issuance of a renewed air permit to Sitix. There is no evidence that MCESD's actions caused discriminatory effects on white Maricopa County residents or that MCESD otherwise discriminated against whites in the community.

II. BACKGROUND ON COMPLAINANT AND RECIPIENT

According to materials provided to OCR by the Complainant, the Citizens Environmental Awareness League (CEAL) was formed in 1997 as a "a community-based non-profit organization in northeast Phoenix" that was "organized for the purpose of educating citizens about the Emergency Planning and Community Right-to-know Act."¹

The Maricopa County Environmental Services Department has the authority to administer Clean Air Act Title V (major source) and non-Title V (minor source) air stationary source permitting, monitoring, and enforcement programs. MCESD receives an annual air grant from EPA.²

III. LEGAL AUTHORITIES

A. Title VI and EPA's Regulations Implementing Title VI

Title VI prohibits discrimination based on race, color, or national origin under programs or activities receiving Federal financial assistance. Specifically, Section 601 of Title VI provides:

¹Letter to OCR from Peter Creelman, CEAL Secretary, October 4, 2001.

²Phone interview with Steven Peplau, MCESD Air Division Manager, November 15, 2001.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.³

Under the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), “any program or activity” is broadly defined so that Title VI prohibitions are applied institution-wide to recipients of Federal financial assistance.

The purpose of Title VI is to ensure that public funds are not spent in a way that encourages, subsidizes, or results in discrimination on the basis of race, color, or national origin. Toward that end, Title VI bars intentional discrimination.⁴

In addition, Section 602 of Title VI authorizes and directs Federal agencies to enact “rules, regulations, or orders of general applicability” to effectuate the provisions of Section 601.⁵ Most Federal agencies have adopted regulations that prohibit recipients of Federal funds from using criteria or methods of administering their programs that have the effect of subjecting individuals to discrimination based on race, color, or national origin. The Supreme Court has recognized that such regulations may validly prohibit practices having a disparate impact on protected groups, even if the actions or practices are not intentionally discriminatory.⁶

EPA’s regulations implementing Title VI, codified at 40 C.F.R. Part 7, were promulgated under the authority of Section 602. Under these regulations, OCR is responsible for investigating complaints alleging intentional discrimination and/or disparate impact discrimination in programs or activities of recipients receiving financial assistance from EPA.⁷

³42 U.S.C.S. § 2000d.

⁴*Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 607-08 (1983). After several attempts (March 15, 2002, OCR conference call with CEAL, March 21, 2002, email correspondence from CEAL, April 23, 2002, OCR telephone interview with CEAL) to clarify the claims in this complaint, EPA’s Office of Civil Rights determined that the Complainant did not allege a claim of intentional discrimination based on race, color, or national origin.

⁵ 42 U.S.C.S. § 2000d-1.

⁶*Guardians*, 463 U.S. at 606 n.27; *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985).

⁷40 C.F.R. § 7.20. In order to be accepted for investigation, a complaint must be in writing, describe alleged discriminatory acts that violate EPA’s regulations implementing Title VI, be filed within 180 days of the date of the alleged discriminatory acts, and involve a recipient of EPA assistance. 40 C.F.R. §§ 7.15, 7.120(b)(1), (2). By letter dated December 20, 2001, OCR found that CEAL’s complaint satisfied these jurisdictional criteria, and accepted the complaint for investigation.

Under 40 C.F.R. § 7.120(g), if OCR's investigation reveals no violation of EPA's Title VI regulations, OCR will dismiss the complaint.

B. Standard for Evaluating Disparate Impact Claim

EPA's regulation at 40 C.F.R. § 7.35(b) provides:

A recipient [of EPA assistance] shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing the accomplishment of the objectives of the program with respect to individuals of a particular race, color, [or] national origin [. . .].

In assessing whether a recipient's criteria or methods of administration resulted in unlawful discriminatory effects, the Agency relies, in part, on case law developed under Title VI and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* This case law sets forth the legal standard for establishing an adverse disparate impact.

1. Elements of a *Prima Facie* Disparate Impact Claim

The Agency will begin its analysis by determining whether a *prima facie* adverse disparate impact case exists. First, OCR must ascertain whether the recipient utilized a facially neutral practice or engaged in a facially neutral action that may have a disproportionate impact on a group protected by Title VI.⁸ In addition, OCR will determine if a causal connection exists between the recipient's policy, practice, or action and the allegedly adverse disparate impact.⁹ If the Agency finds that a causal connection exists, it will then determine whether the alleged impact is significantly "adverse" and "disparate" on the group that allegedly suffered the

⁸ *New York City Env'tl. Justice Alliance (NYCEJA) v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993); *Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984).

⁹ *NYCEJA*, 214 F.3d at 69.

impact.¹⁰ If the Agency cannot establish all of these *prima facie* elements, then the Agency will make a finding of no violation, and dismiss the complaint.¹¹

2. Adversity

In order to violate EPA's Part 7 regulations, the impact from a recipient's action must be "adverse." In other words, the recipient's action must cause more than a *de minimis*, insignificant, or minor effect on a protected group.¹² The action must impose some significant hardship on the protected group, such as limitation of important opportunities and benefits.¹³ Resulting unequal burdens or benefits, in and of themselves, may not be sufficient to establish adversity.¹⁴

3. Justification and Less Discriminatory Alternatives

If a *prima facie* adverse disparate impact case exists, the Agency will determine if the recipient can provide a "substantial legitimate justification" for its action that caused the adverse disparate impact.¹⁵ If the recipient *cannot* provide a justification, then the Agency will find that the recipient violated EPA's Part 7 regulations. If the recipient *can* provide a justification, then the Agency will determine if there was a "less discriminatory alternative" for the recipient's action.¹⁶ If a less discriminatory alternative did exist, then the Agency will find that the recipient violated EPA's Part 7 regulations. If no less discriminatory alternative existed, then the Agency will make a finding of no violation and dismiss the complaint.

¹⁰*NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1332 (3d Cir. 1981); cf. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 656-57 (1989) (Title VII case); see *Bryan v. Koch*, 627 F.2d 612, 617 (2d Cir. 1980).

¹¹40 C.F.R. § 7.120(g).

¹²*NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1332 (3d Cir. 1981).

¹³*Id.*; *Larry P. v. Riles*, 793 F.2d 969, 983 (9th Cir. 1986).

¹⁴*NAACP*, 657 F.2d at 1332.

¹⁵See *Elston*, 997 F.2d at 1413 ; *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417-18 (11th Cir. 1985).

¹⁶See *Elston*, 997 F.2d at 1407.

IV. ALLEGATIONS

The complaint alleged that MCESD violated EPA's regulations implementing Title VI by conducting "a public hearing regarding the issuance of an air pollution permit for Sumitomo Sitix of Phoenix, Inc. [. . .] at a time [4:00PM to 7:00PM on Tuesday, August 7, 2001] when local affected area residents could not attend." Additionally, the complaint stated that "the local population proximate to Sumitomo Sitix of Phoenix, Inc. is overwhelmingly middle class whites," and "[a]ll other public hearings for air pollution permits conducted by MCESD in all other parts of MCESD's jurisdiction including communities of color and low-income communities, have been conducted at times that were conducive to public attendance and participation, i.e., with hearings starting at 7:00PM on weekdays."¹⁷

On March 21, 2002, the Complainant provided OCR with clarification that explained that it was alleging discriminatory effects rather than intentional discrimination by MCESD. The Complainant clarified the initial complaint by alleging that MCESD's scheduling of the August 7, 2002, public hearing for 4:00PM incidentally had a discriminatory effect (disparate impact) based on race:

Maricopa County Environmental Services Department, by choosing to hold its public hearing for the new Sumitomo Sitix air permit to start at 4:00 p.m. instead of the usual 6:00 or 6:30 p.m. as was true of virtually all their other air permit hearings they held, were discriminating against the people who live in the community of northeast Phoenix and who would want to attend this public hearing on a factory that greatly concerns them. This choice by Maricopa County was discriminatory against this group of people, who happen to be mostly white and most of whom would be working at various jobs at the start time of 4:00 p.m.¹⁸

During a telephone interview on May 29, 2002, Peter Creelman, CEAL Secretary, provided OCR with clarification of how the Complainant believed that its members or local residents were harmed by the fact that the August 7, 2001, Sitix permit hearing was scheduled to start at 4:00PM rather than the typical public hearing start time of 6:00PM or 6:30PM. Mr. Creelman stated his belief that if the meeting would have started at 4:00PM as scheduled (rather than the actual start time of 5:15), then MCESD would have ended meeting at 5:30PM or 6:00PM even though the hearing was scheduled to last until 7:00PM. Mr. Creelman alleged that MCESD would have ended the meeting early in order to limit public participation. Mr.

¹⁷CEAL Title VI Complaint, OCR Case Number 11R-01-R9, Received September 10, 2001.

¹⁸Email note to OCR from Christian Klein, CEAL President, March 21, 2002.

Creelman stated that the August 7, 2001, public hearing was poorly attended in comparison to previous air permit hearings, thus proving that MCESD was successful in limiting public participation. The Complainant also alleged that MCESD gave inadequate public notice of the scheduled August 7, 2001, Sitix hearing. In particular, the Complainant alleged that MCESD's failure to publish notice of the hearing in the *Arizona Republic*, which is the most widely circulated newspaper in Arizona, demonstrated the inadequacy of the MCESD's public notice.¹⁹

V. RECIPIENT'S RESPONSE

OCR notified MCESD and the Complainant in writing of the receipt of the complaint on October 16, 2001. MCESD responded to the allegations in the complaint in letters dated January 31, 2001, and February 5, 2001.

MCESD clarified its decision to start the August 7, 2001, public hearing at 4:00PM in a letter to OCR dated January 31, 2002:

The following are factors that contributed to the scheduling of the public hearing for Sumitomo Sitix from 4 p.m. to 7 p.m. on August 7, 2001:

- * To give people with a variety of schedules the opportunity to provide their input at the hearing. This includes people who came after working a full day outside the home and people who remain at home during the day and wish to have their evening free.
- * For more convenience to the public, our department and Sitix coordinated the end time of Sitix open house with the beginning time of the public hearing and held them at the same location, Horizon High School cafeteria.

The Department's intent was to make the combined events as convenient as possible for as many people as possible to receive comments on the proposed permit.²⁰

Bruce White, Deputy County Attorney for MCESD, requested that the CEAL complaint "should be rejected without further investigation" in a letter to OCR dated February 5, 2002. Mr.

¹⁹OCR phone interview with Peter Creelman, CEAL Secretary, May 29, 2002.

²⁰Letter to OCR from Al Brown, MCESD Director, January 31, 2002.

White asserted that "[t]here is no legal authority to suggest that a public comment hearing that is not even required for issuance of the permit in question must be conducted at a certain time."²¹

Mr. White stated:

Complainant fails to allege or explain how the alleged affected community would suffer an adverse and discriminatory affect from the public comment hearing that was conducted on August 7, 2001. The Complainant has provided no legal support for the notion that a public comment hearing conducted partly during normal business hours and partly after hours is a discriminatory act in violation of Title VI of the Civil Rights Act.²²

Mr. White denied that MCESD attempted to limit public participation at the August 7, 2001, public hearing:

The hearing was scheduled to commence at 4:00 p.m., and to extend up to 7:00 p.m., well after normal working hours. In fact, the hearing extended until 7:25 p.m. There can be no plausible claim that MCESD sought to exclude input from any interested member of the public.²³

On June 5, 2002, MCESD provided OCR with additional information concerning the written comments that MCESD received concerning the renewal of the Sitix air permit.²⁴ MCESD stated that no one complained in the written comments that he or she had wanted to attend the August 7, 2001, public hearing but were prevented from doing so because of the time period in which the hearing was conducted.²⁵

²¹Letter to OCR from Bruce White, Deputy County Attorney for MCESD, February 5, 2002.

²²*Id.*

²³*Id.*

²⁴Email from OCR to MCESD, June 5, 2002.

²⁵Email to OCR from MCESD, June 19, 2002.

Only one person, Peter Creelman, CEAL Secretary, submitted a written objection to the 4:00PM starting time of the August 7, 2001, public hearing.²⁶ Creelman submitted written comments on his own behalf and not as a representative of CEAL.²⁷

Additionally, MCESD noted that when CEAL requested a public hearing concerning the Sitix air permit renewal on May 15, 2001, it did not request that the hearing be held at any particular time.²⁸

VI. FINDINGS CONCERNING RECIPIENT'S SCHEDULING OF AIR PERMIT PUBLIC HEARINGS

In order to examine the Complainant's allegation that "all other public hearings for air pollution permits conducted by MCESD in all other parts of MCESD's jurisdiction including communities of color and low-income communities, have been conducted at times that were conducive to public attendance and participation, i.e., with hearings starting at 7:00PM on weekdays,"²⁹ OCR requested from the Complainant and MCESD a list of the scheduled times and the actual duration times of all air permit public hearings conducted by MCESD since 1998. The previous Sitix air permit public hearing was scheduled for 6:00PM until 9:00PM. The list of hearing times that OCR received from the Complainant³⁰ was identical to the list of hearing times that OCR received from MCESD.³¹ OCR thus found no disagreement between the Complainant and recipient on the public hearing times of the 17 air permit public hearings held by MCESD between January 1, 1998, and December 31, 2001.

The following is a list of the scheduled and actual public hearing times of the 17 air permit public hearings held by MCESD between January 1, 1998, and December 31, 2001³²:

²⁶*Id.*

²⁷Letter from Peter Creelman to MCESD, August 8, 2001.

²⁸Letter from CEAL to Steven Peplau, MCESD Air Division Manager, May 15, 2001.

²⁹CEAL Title VI Complaint, OCR Case Number 11R-01-R9, Received September 10, 2001.

³⁰Fax to OCR from Pete Creelman, CEAL Secretary, December 4, 2001.

³¹Fax to OCR from Pat Sutton, MCESD Office Manager, December 19, 2001.

³²Fax to OCR from Pat Sutton, MCESD Office Manager, December 19, 2001.

	<u>DATE</u>	<u>MINOR FACILITIES</u>	<u>SCHEDULED TIMES</u>	<u>ACTUAL TIMES</u>
1.	1/8/1998	Quality Printed Circuits	6:00 to 7:00 PM	6:00 to 7:00 PM
2.	1/28/1998	ME West Castings	6:00 to 7:00 PM	6:11 to 7:08 PM
3.	2/10/1998	Reopening, Sumitomo Sitix	6:00 to 9:00 PM	6:13 to 8:56 PM
4.	7/29/1998	National Metals	6:00 to 7:00 PM	6:00 to 7:00 PM
5.	10/5/2000	ME West Castings	6:00 to 7:00 PM	6:24 to 7:10 PM
6.	8/7/2001	Sumitomo Sitix	4:00 to 7:00 PM	5:15 to 7:25 PM
7.	10/18/2001	RMI Ready Mix	3:00 to 5:00 PM	3:00 to 5:00 PM
			6:00 to 7:00 PM	6:00 to 7:00 PM
8.	11/27/2001	Intel Corporation	6:30 to 7:30 PM	6:30 to 7:30 PM

	<u>DATE</u>	<u>MAJOR FACILITIES</u>	<u>SCHEDULED TIMES</u>	<u>ACTUAL TIMES</u>
9.	5/16/2000	West Phoenix Expansion	6:30 to 7:30 PM	6:35 to 7:40 PM
10.	9/26/2000	Redhawk (Pinnacle West)	6:30 to 7:30 PM	6:41 to 7:25 PM
11.	10/3/2000	Duke Energy (Arlington)	6:30 to 7:30 PM	6:39 to 7:26 PM
12.	11/21/2000	Sempra (Mesquite)	6:30 to 7:30 PM	6:50 to 7:31 PM
13.	11/28/2000	PG&E (Harquahala)	6:30 to 7:30 PM	6:45 to 7:30 PM
14.	1/17/2001	Panda	6:30 to 7:30 PM	6:38 to 7:28 PM
15.	1/18/2001	SRP (Kyrene Expansion)	6:30 to 7:30 PM	6:30 to 7:45 PM
16.	7/18/2001	Panda Significant Revision	6:00 to 8:00 PM	6:00 to 7:30 PM
17.	10/22/2001	APS West Phoenix	6:00 to 7:00 PM	6:00 to 7:00 PM

VII. FINDINGS CONCERNING OPPORTUNITIES FOR ADDITIONAL COMMENTS DURING AND AFTER THE AUGUST 7, 2001. SITIX HEARING

OCR examined documentary evidence concerning the August 7, 2001, Sitix hearing. After reviewing the minutes from the hearing, OCR found that near the end of the hearing, MCESD officials asked hearing attendees if anyone else wanted to make comments for the record. By this point in the hearing, the hearing had gone over the originally scheduled adjournment of 7:00 PM. The minutes indicate that no one expressed the desire to make additional comments.³³ OCR also found that, pursuant to Arizona law, members of the public were provided a 30-day period to

³³Transcript of Public Hearing for Sitix, p. 85, MCESD, August 7, 2001.

submit written comments, which ended at 5:00PM the day after the August 7, 2001, public hearing.³⁴

VIII. FINDINGS CONCERNING MCESD'S PUBLIC NOTICE PRIOR TO AUGUST 7, 2001, SITIX HEARING

OCR examined the actions taken by MCESD to provide the public with adequate advance notice of the August 7, 2001, public hearing.

In accordance with typical MCESD procedure for issuance of public notices of hearings³⁵, MCESD published notice of the August 7, 2001, public hearing in *The Arizona Business Gazette* on July 5, 2001, and on July 12, 2001, and in *The Record Reporter* on July 6, 2001, and on July 11, 2001.³⁶

Notice of the August 7, 2001 public hearing, along with a copy of permit and related materials, was posted on MCESD's web site.³⁷

OCR asked MCESD why notice of the hearing was not published in the *Arizona Republic* newspaper, which has the largest circulation in Arizona. Steven Peplau, MCESD Air Division Manager, said that MCESD does not typically publish public hearing notices in the *Arizona Republic* because of the high advertising costs. A public hearing notice published in the *Arizona Republic* would cost \$600.00. MCESD has estimated that the publication of all of its public hearing notices in the *Arizona Republic* would cost from \$25,000.00 to \$30,000.00 per year.³⁸

OCR asked MCESD why a press release concerning the August 7, 2001, public hearing was not issued until August 6, 2001, the day before the hearing. Mr. Peplau, responded that it is customary for MCESD to issue press releases one day prior to public hearings. He said that MCESD has found that "if they issue press releases too far in advance of a hearing, the press

³⁴Arizona Revised Statutes, §§ 49-426 and 49-480; Maricopa County Air Pollution Control Regulations, Rule 220-407.6.

³⁵Phone interview with Steven Peplau, MCESD Air Division Manager, January 15, 2002.

³⁶MCESD Public Notice, July 5, 2001.

³⁷Transcript of Public Hearing for Sitix, MCESD, August 7, 2001 (referencing www.maricopa.gov/envsvc).

³⁸Phone interview with Steven Peplau, MCESD Air Division Manager, January 15, 2002.

forgets about it.”³⁹ He also noted that two members of the press attended the August 7, 2001, public hearing.⁴⁰

IX. ANALYSIS

In order to establish a violation of EPA’s Title VI regulations prohibiting disparate impacts, a complaint must establish a *prima facie* disparate impact claim. One of the elements of a *prima facie* disparate impact claim is that a recipient’s facially neutral policy or conduct must have caused an “adverse” impact on a particular group.⁴¹ To satisfy this requirement for purposes of this complaint, MCESD’s scheduling of the August 7, 2001, Sitix hearing must have imposed some significant hardship on the protected group, such as limitation of important opportunities and benefits.⁴² For example, an adverse impact may have existed here if MCESD’s actions significantly reduced the Complainant’s ability to comment vis-a-vis other public hearings. In light of the evidence gathered during the investigation of this complaint, OCR concludes that MCESD’s scheduling of this Sitix hearing did not impose a significant hardship on white Maricopa County residents.

First, the undisputed evidence indicates that there was substantial overlap between the actual meeting time of the August 7, 2001, Sitix hearing, which lasted from 5:15PM to 7:25PM, and the other air permit public hearings that MCESD scheduled between 1998 and 2001. Six of the remaining 15 public hearings (*i.e.*, the Quality Printed Circuits, ME West Castings (January 28, 1998), National Metals, ME West Castings (October 5, 2000), Redhawk (Pinnacle West), and APS West Phoenix hearings) began later than, and ended at the same time as or earlier than, the August 7, 2001, Sitix hearing. Eight of the remaining public hearings (*i.e.*, the Intel Corporation, West Phoenix Expansion, Duke Energy (Arlington), Sempra (Mesquite), PG&E (Harquahala), Panda, SRP (Kyrene Expansion), and Panda Significant Recision hearings) ended within twenty minutes of the time that the August 7, 2001, Sitix hearing ended (*i.e.*, at or before 7:45PM). In addition, all of the remaining 15 hearings (*i.e.*, all the hearings except the February 2, 1998, Sitix Reopening) were shorter in duration than the August 7, 2001, Sitix hearing. Thus, there was significant overlap in the hearing time between the August 7, 2001, Sitix hearing and 15 of the 16 remaining hearings.

³⁹Phone interview with Steven Peplau, MCESD Air Division Manager, January 16, 2002.

⁴⁰*Id.*

⁴¹*See NAACP*, 657 F.2d at 1332.

⁴²*See id.*; *Larry P.*, 793 F.2d at 983.

Second, contrary to the Complainant's claim that "all other public hearings for air pollution permits conducted by MCESD in all other parts of MCESD's jurisdiction including communities of color and low-income communities, have been conducted at times that were conducive to public attendance and participation, i.e., with hearings starting at 7:00PM on weekdays,"⁴³ the evidence reveals that none of the other MCESD air permit hearings from 1998 until 2001, began as late as 7:00PM. One of the 17 meetings (*i.e.*, the RMI Ready Mix hearing that began at 3:00 PM on October 18, 2001) began before the 4:00 PM start time of the August 7, 2001, Sitix hearing. Only 8 of the 17 hearings (*i.e.*, the Intel Corporation, West Phoenix Expansion, Redhawk (Pinnacle West), Duke Energy (Arlington), Sempra (Mesquite), PG&E (Harquahala), Panda, and SRP (Kyrene Expansion) hearings) began at or after 6:30 PM, but no later than 6:50PM. All the other hearings (*i.e.*, the Quality Printed Circuits, ME West Castings (January 28, 1998), Sitix Reopening (February 10, 1998), National Metals, ME West Castings (October 5, 2000), Sitix (August 7, 2001), RMI Ready Mix, Panda Significant Revision, and APS West Phoenix hearings) began before 6:30PM. Thus, although the August 7, 2001, Sitix hearing began earlier than 15 of the remaining 16 hearings, it ended at 7:25PM, which was later than or not significantly earlier than 15 of the remaining 16 hearings.

Last, even assuming that MCECED's scheduling of August 7, 2001, Sitix hearing was inconvenient or unusually early for the Complainant, the record indicates that this hearing was closed only after everyone had spoken. In fact, the evidence suggests that the hearing would have run even longer if additional hearing participants had wanted to speak.⁴⁴ With the exception of the February 10, 1998, Sitix Reopening hearing, the August 7, 2001, Sitix hearing was well attended in relation to the other non-Title V hearings conducted by MCESD from 1998 through 2001. As the record indicates, the attendance at the August 7, 2001, Sitix hearing (*i.e.*, 48 attendees) was nearly or more than double the attendance at five of the other seven non-Title V public hearings.⁴⁵ This contradicts the Complainant's allegation that the hearing was "poorly

⁴³In its clarification of the complaint, Complainant stated that virtually all the other hearings started at either 6:00 or 6:30PM. Based on the documentary evidence, this clarification of the allegations is more factually accurate than the original complaint allegations, which stated that all the other scheduled start times were at 7:00PM. However, for the reasons stated later in this Final Dismissal Letter, MCESD's scheduling of the Sitix hearing, in comparison with its scheduling of the other hearings, did not cause an adverse disparate impact.

⁴⁴Transcript of Public Hearing for Sitix, p. 85, MCESD, August 7, 2001.

⁴⁵OCR examined the attendance sign-in sheets for each of the non-Title V public hearings conducted by MCESD between January 1, 1998, and December 31, 2001 (received by OCR from MCESD on May 16, 2002). The total attendance at these public hearings is shown in the following list.

1. 2/10/1998	Sumitomo Sitix	Number of attendees: 116
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attended in comparison to previous air permit hearings.” Moreover, irrespective of whether MCESD’s scheduling of the August 7, 2001, Sitix hearing was inconvenient, the record indicates that, in accordance with state and local statutory and regulatory authority, MCESD provided a 30-day period for the submission of written comments from the public.⁴⁶ This provided further opportunity for public participation outside of the scheduled hearing time.

While the Complainant argues that MCESD’s original 4:00PM scheduling of the August 7, 2001, Sitix hearing was harmful to Maricopa County whites, the Complainant has not disputed that the actual start time for the hearing was 5:15PM. In light of the evidence that the hearing duration overlapped significantly with at least 13 of the other MCESD air permit hearings, and that MCESD provided 30 days for the submission of written comments, the Complainant has not alleged additional circumstances suggesting that MCESD subjected Maricopa County whites to an adverse disparate impact.

Therefore, the record fails to substantiate the allegation that MCESD’s scheduling of the August 7, 2001, hearing imposed a significant hardship, or an adverse impact, on Maricopa County whites. While the scheduling of the August 7, 2001, Sitix hearing may have differed from the scheduling of the February 10, 1998, Sitix Reopening hearing, this alone cannot suffice to show that MCESD’s conduct was discriminatory.⁴⁷ To the contrary, the record reveals that MCESD provided Maricopa County residents with ample opportunity, both at the August 7, 2001, hearing and during the 30-day written comment period, to express their views on the air

2. 8/7/2001	Sumitomo Sitix	Number of attendees: 48
3. 10/18/2001	RMI Ready Mix, Inc.	Number of attendees: 27
4. 1/8/1998	Quality (Mosaic) Printed Circuits	Number of attendees: 19
5. 1/28/1998	ME -West Castings Inc.	Number of attendees: 13
6. 11/27/2001	Intel Corporation	Number of attendees: 9
7. 10/05/2000	ME West Castings	Number of attendees: 8
8. 7/29/1998	National Metals	No sign in sheet

⁴⁶Arizona Revised Statutes, Sections 49-426 and 49-480; Maricopa County Air Pollution Control Regulations, Rule 407.6.

⁴⁷See *NAACP*, 657 F.2d at 1332 (resulting unequal burdens or benefits, in and of themselves, may not be sufficient to establish adversity.)

permit renewal for the Sitix facility. Thus, they were not limited in the important opportunity or benefit⁴⁸ of public participation during the Sitix air permit renewal process.

Accordingly, the Agency finds that the complaint has not established a *prima facie* disparate impact claim. Thus, the Agency does not need to address whether MCESD provided a substantial, legitimate justification for scheduling the August 7, 2001, Sitix hearing, or whether a less discriminatory alternative for the scheduled hearing time was available.

X. CONCLUSION

Based on the facts established during this investigation and the applicable legal standards, OCR concludes that the Complainant's allegations of an unlawful disparate impact are unsubstantiated by the record. Thus, OCR finds no violation of EPA's regulations implementing Title VI, and hereby dismisses CEAL's complaint against MCESD, pursuant to 40 C.F.R. § 7.120(g).

If you have any questions, please contact Tom Born in the Office of Civil Rights by telephone at 202-564-7294, or by mail at U.S. EPA, Mail Code 1201A, Washington, D.C., 20460-0001.

Sincerely,


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⁴⁸See *id.*; *Larry P.*, 793 F.2d at 983.

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